STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 13, 2005
v	No. 252936 Ingham Circuit Court
DEWAYNE DARNELL LATHON, Defendant-Appellant.	LC No. 03-000790-FH

Before: Jansen, P.J., and Murray and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his conviction for second-degree home invasion, MCL 750.110a. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to 36 to 180 months' imprisonment. We affirm.

I. Material Facts and Proceedings

On April 25, 2003, a person described as a black male wearing a baseball cap was seen using the back entrance at 710 Brook Street by the next-door neighbor, Emma Garza. According to Garza,[1] the man entered the back door of the house, and came out approximately five minutes later with a bag of bottles. The man left the residence by bicycle and headed toward the Quality Dairy. No one was in the home at the time of the entry. Although the back door may have been used by the victim's sons earlier that day, the door was relocked before they left. The returnable cans were last seen the previous day by the homeowner victim. Defendant was not given permission to enter the house by the homeowner or her sons.

At approximately 10:00 a.m., Officer David Blackman received a call about a person taking pop cans, described as a black male, wearing a blue shirt, and riding a bicycle. Blackman found a man matching the description riding a bicycle toward the Quality Dairy and carrying a large plastic bag with pop cans. Blackman recognized the man as defendant. When Blackman approached defendant, defendant was putting cans into the return container. Defendant informed Blackman that he took the pop cans from a house. Defendant then elaborated that he saw the cans in a bag next to the driveway of a house on Brook Street as he rode his bicycle past the

[1] Garza was unable to identify the person who entered 710 Brook Street in a line-up.

house. Defendant also stated that he had not been to any other house on Brook Street. According to Blackman, defendant had approximately sixty to eighty cans.

The victim and her family always kept their returnable cans on the back porch, and had approximately thirty cans on the porch that day. According to the home owner and her sons, cans had been taken from the house before the date of the incident; however, the screen door did not have a hole in it on that particular day.[2] The homeowner and her family kept the screen door locked to prevent people from entering. Additionally, because the back door is kept locked, the household members utilize the front entrance when leaving.

While investigating the homeowner's complaint, Officer Joel Johnson located one fingerprint on the inside of the back door just above the handle. Officer Ken Lucas matched the latent print with defendant's known print.

II. Directed Verdict

Defendant first argues that the trial court erred in denying his motion for a directed verdict because there was insufficient evidence presented from which a rational trier of fact could have found all the elements of second-degree home invasion were established beyond a reasonable doubt. We disagree. We review de novo the trial court's decision on a motion for directed verdict to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecution, could persuade a rational trier of fact that the essential elements of the crime charged were proven beyond a reasonable doubt. *People v Aldrich*, 246 Mich App 101, 122-123; 631 NW2d 67 (2001).

Defendant contends that because Garza was unable to identify the individual who took the cans as defendant, the evidence was insufficient to demonstrate that defendant was the individual who actually took the cans. The elements of second-degree home invasion are (1) that the defendant (a) broke and entered a dwelling or (b) entered a dwelling without permission, and (2) that when the defendant broke and entered the dwelling or entered the dwelling without permission, he intended to commit a felony, larceny, or assault or did commit a felony, larceny, or assault therein. MCL 750.110a(3). A defendant's intent can be inferred from the circumstances and facts surrounding the incident. *People v Lugo*, 214 Mich App 699, 709-710; 542 NW2d 921 (1995).

Viewing the evidence presented in the light most favorable to the prosecution, we find that a rational trier of fact could be persuaded that the essential elements of the crime charged were proven beyond a reasonable doubt. Here, Garza testified that she saw a black male wearing a baseball cap enter the victim's home, and leave the house with a bag of cans on a bicycle. Defendant was located and questioned by Blackman because he was in the vicinity of the house and met the description of the person entering the house. Defendant admitted to Blackman that he took the cans from a house on Brook Street, although he said the cans were in the driveway. Defendant's fingerprint matched the latent fingerprint taken from the residence, placing

[2] The screen had been previously torn three to four times.

defendant at the residence. Additionally, defendant was not given permission to enter the dwelling. Finally, it could be inferred from the circumstances that defendant committed a felony, larceny, or assault therein. Larceny is defined as the taking and carrying away of the property of another, done with felonious intent and without the owner's consent. *People v Malach*, 202 Mich App 266, 270; 507 NW2d 834 (1993). Garza testified that she saw the person enter the residence and then exit the residence shortly thereafter carrying the bag of returnables. From this evidence, it could be inferred that it was defendant who entered the residence, and committed a larceny by specifically removing the bag of returnables without permission. Accordingly, the trial court properly denied defendant's motion for a directed verdict.

III. Home Invasion Charge

Additionally, defendant contends that there was insufficient evidence to support his conviction, and that the prosecution abused its discretion in charging defendant with second-degree home invasion instead of third-degree home invasion.[3] We disagree. The prosecution is given broad charging discretion, and may bring any charges supported by the evidence. *People v Nichols*, 262 Mich App 408, 415; 686 NW2d 502 (2004).

Here, defendant argues that there was no evidence that defendant was going to take anything other than "$3 worth of returnables," or that defendant tried to get into the home or to steal any other property. As such, defendant contends that there was insufficient evidence to support his conviction for second-degree home invasion. Defendant further indicates that second-degree home invasion and third-degree home invasion are delineated by whether there was intent to commit a felony or a misdemeanor, and that because the felony threshold for larceny was increased, this should carry over to the home-invasion statute to provide defendant leniency.

Defendant ignores the plain language of the statute, which does not merely delineate between second- and third-degree home invasion by whether a felony or misdemeanor has occurred. Instead, the statute specifically states, in relevant part:

> [A] person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling without permission and, *at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault* is guilty of home invasion in the second degree. [MCL 750.110a (emphasis added).]

Thus, the plain language of the statute does not limit second-degree home invasion to those persons entering a dwelling with the intent to commit a felony or those who do commit a felony.

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[3] Defendant briefly mentioned in the "Issue Preservation" section that trial counsel was ineffective for failing to raise this issue. Defendant has provided no factual support and no legal citation or analysis regarding this assertion. An issue given only cursory treatment with little or no citation of supporting authority and left to this Court to discover and rationalize the basis for the claims constitutes an abandonment of the issue. *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004).

Rather, the statute also applies to those who enter a dwelling with intent to commit a larceny or an assault or that committed a larceny or an assault. As previously stated, there was sufficient evidence to demonstrate that defendant entered the dwelling without permission and that he committed a larceny therein. Accordingly, the prosecution did not abuse its discretion in charging defendant with second-degree home invasion.

IV. Fingerprint Evidence

Defendant next argues that his trial counsel was ineffective because he did not request that the court exclude fingerprint evidence from trial. We disagree.

In order to preserve the issue of effective assistance of counsel for appellate review, the defendant must bring a motion for a new trial or an evidentiary hearing in the trial court.[4] *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000). Where the defendant fails to create a testimonial record in the trial court with regard to his claims of ineffective assistance, appellate review is foreclosed unless the record contains sufficient detail to support his claims. *People v Dixon*, 217 Mich App 400, 408; 552 NW2d 663 (1996). "Whether a defendant has been denied the effective assistance of counsel is a mixed question of law and fact." *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003). As defendant failed to move in the trial court for an evidentiary hearing or a new trial, our review is limited to the facts on the existing record. *Sabin*, *supra* at 659.

To establish a claim of ineffective assistance of counsel, defendant must demonstrate (1) that his trial counsel's performance fell below an objective standard of reasonableness; and (2) that he was so prejudiced thereby that it denied him a fair trial, i.e., there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Moorer*, 262 Mich App 64, 75-76; 683 NW2d 736 (2004). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

Defendant contends that trial counsel was ineffective for failing to bring a motion to exclude the fingerprint evidence, arguing that the prosecution violated the continuing disclosure demand since there was no mention of fingerprint evidence in the court file and the witness list was not amended to include the fingerprint expert. Although defendant indicates that the witness list was not amended to include the fingerprint expert, defendant neglects to mention that on October 1, 2004, the "Notice of Witnesses" was filed in the circuit court by the prosecution, which included Ken Lucas, who testified that the latent print matched defendant's known print. Although defendant seems to assert that the prosecution failed to meet the requirements of MCR 6.201(A)(3), which requires the parties to provide reports produced by or for an expert witness, there is no indication in the record that a report was completed by or for an expert witness the

[4] Defendant moved in this Court for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), but this Court denied the motion, determining that defendant failed to demonstrate by affidavit or an offer of proof the facts to be established at a hearing. *People v Lathon*, unpublished order of the Court of Appeals, entered August 27, 2004 (Docket No. 252936).

prosecution intended to call at trial, as Lucas did not refer to any report during his testimony. As such, defendant has failed to demonstrate that his trial counsel's performance fell below an objective standard of reasonableness, and that defendant was so prejudiced thereby that it denied him a fair trial.

V. Cumulative Effect

Next, defendant argues that he is entitled to a new trial because the cumulative effect of the above claimed errors denied him the right to a fair trial. We disagree. When a defendant sets forth a claim of cumulative error, "reversal is warranted only if the effect of the errors was so seriously prejudicial that the defendant was denied a fair trial." *People v Werner*, 254 Mich App 528, 544; 659 NW2d 688 (2002).

"The cumulative effect of several errors can constitute sufficient prejudice to warrant reversal where the prejudice of any one error would not." *People v LeBlanc*, 465 Mich 575, 591; 640 NW2d 246 (2002). However, in calculating the cumulative effect of the errors, only actual errors are considered. *Id.* at 592 n 12. Finding no error in the above stated claims, there can be no cumulative effect depriving defendant of his right to a fair trial.

VI. Offense Variable (OV) 13

Finally, defendant argues that he is entitled to resentencing in conjunction with *Blakely v Washington*, 542 US __; 124 S Ct 2531; 159 L Ed 2d 403 (2004). We disagree. Whether the law of the case doctrine applies is an issue this Court reviews de novo. *Kalamazoo v Dep't of Corrections (After Remand)*, 229 Mich App 132, 134-135; 580 NW2d 475 (1998).

Defendant argues that he should not receive any points for OV 13, MCL 777.43(1)(c),[5] because this variable punishes defendant for being engaged in a pattern of criminal activity, whereas this activity is already covered in the prior record variable score and utilizes the same information in the offense variable. The prosecution contends that this issue is governed by the law of the case doctrine in connection with this Court's August 27, 2004, order.

The law of the case doctrine prevents both the trial court and this Court from reconsidering an issue already decided by an equal or superior court during earlier proceedings in the same case. *People v Mitchell*, 231 Mich App 335, 340; 586 NW2d 119 (1998). Unless there has been a change in the law or the relevant facts, this Court cannot, pursuant to the law of the case doctrine, decide the issue any differently on appeal. *Grace v Grace*, 253 Mich App 357, 362-263; 655 NW2d 595 (2002).

This Court denied defendant's motion for a remand for resentencing, stating the following:

[5] OV 13 instructs that ten points should be scored when "[t]he offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property . . . ." MCL 777.43(1)(c).

> The motion for a remand for resentencing on the ground that OV13 is unconstitutional is DENIED for lack of merit in the ground presented in view of the fact that the case upon which appellant relied does not affect the indeterminative sentencing system used by our state. *Blakely v Washington*, 542 US __; __ S Ct __; __ L Ed 2d __ (2004), slip op, p 12-13. See also *People v Claypool*, [470 Mich 715, 730 n 14; 684 NW2d 278 (2004)]. [*People v Lathon*, unpublished order of the Court of Appeals, entered August 27, 2004 (Docket No. 252936).]

Here, defendant again relies on *Blakely*, *supra*, in support of his argument that OV 13 is unconstitutional. Defendant has failed to demonstrate that there has been a change in the law or the relevant facts; therefore, we cannot, pursuant to the law of the case doctrine, decide this issue any differently on appeal. *Grace*, *supra*.

Affirmed.

/s/ Kathleen Jansen
/s/ Christopher M. Murray
/s/ Pat M. Donofrio